No. 94-574

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In The

Supreme Court of the United States

October Term, 1994

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION,

Petitioner,

vs.

GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE, AND THE STATE OF TEXAS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 2

I. By Ignoring the Uncertainty of Any State Law Theory of Liability and of Any State Forum by Which the Foundation May Present Its Claims to the Disputed Land, the Fifth Circuit Rendered a Decision That Is Contrary to the Jurisprudence of this Court and of Other Circuits 2

CONCLUSION 9

TABLE OF AUTHORITIES

Page

Cases

Abderholden v. Morizot, 856 S.W.2d 829 (Tex. App. – Austin 1993, no writ) 6

Avalon Distrib., Inc. v. P.S. Operations, Inc., 76 Ohio App. 3d 615, 602 N.E.2d 758 (1991), *jurisdictional motion overruled*, 63 Ohio St. 3d 1474, 591 N.E.2d 243 (1992) 7

Board of Educ. of City of Chicago v. Box, 191 Ill. App. 2d 31, 547 N.E.2d 627 (1989) 7

Brosseau v. New Mexico State Hwy. Dept., 92 N.M. 328, 587 P.2d 1339 (N.M. 1978) 4

Department of Public Safety of Texas v. Great Southwest Warehouses, Inc., 352 S.W.2d 493 (Tex. Civ. App. – Austin 1961, writ ref'd n.r.e.) 7

Duhart v. State, 610 S.W.2d 740 (Tex. 1980) 5

General Oil Co. v. Crain, 209 U.S. 211, 28 S. Ct. 475, 52 L. Ed. 754 (1908) 8

Gorman v. Life Ins. Co. of N. Am., 752 S.W.2d 710 (Tex. App. – Houston [14th Dist.] 1988), *aff'd in part, rev'd in part on other grounds*, 811 S.W.2d 542 (Tex. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 88, 116 L. Ed. 2d 60 (1991) 6

Land Dept. v. O'Toole, 154 Ariz. 43, 739 P.2d 1360 (Ariz. App. 1987) 4

Larson v. Domestic & Foreign Service Corp., 337 U.S. 682, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949) 2

TABLE OF AUTHORITIES – Continued

Page

Lyon v. State, 76 Idaho 374, 283 P.2d 1105 (Idaho 1955) 4

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803) 8

Mount Pleasant I.S.D. v. Estate of Lindburg, 766 S.W.2d 208 (Tex. 1989) 5

Tindal v. Wesley, 167 U.S. 204, 17 S. Ct. 770, 42 L. Ed. 137 (1897) 3, 9

Toledo, Peoria & Western R. Co. v. State of Illinois, Dept. of Transp., 744 F.2d 1296 (7th Cir. 1984), *cert. denied*, 470 U.S. 1051, 105 S. Ct. 1751, 84 L. Ed. 2d 815 (1985) 3

United States v. Lee, 106 U.S. (16 Otto) 196, 1 S. Ct. 240, 27 L. Ed. 171 (1882) 2, 3, 8

United States v. Testan, 424 U.S. 392, 96 S. Ct. 948, 47 L. Ed. 2d 114 (1976) 3

United States v. Woodall, 12 F.3d 791 (8th Cir. 1993) 8

Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908) 3, 9

STATUTES

28 U.S.C. § 1346 2

28 U.S.C. § 1491 2

28 U.S.C. § 2409a 3

42 U.S.C. § 1983 ..... 2, 3, 7

Ariz. Rev. Stat. §§ 12-1101 to -1104 4

Idaho Code § 6-401 4

TABLE OF AUTHORITIES – Continued

Page

Ill. Comp. Stat. ch. 705, §§ 505/1 to 29 3

N.M. Stat. §§ 42-6-12 to -17 4

N.Y. Ct. Cl. Act §§ 1-30 3

Ohio Rev. Code §§ 2743.01 to .72 3

Tex. Nat. Res. Code § 33.001(a) 4

Tex. Nat. Res. Code § 33.002 4

Tex. Nat. Res. Code § 33.171 .....2, 4, 5, 6, 7, 8

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In order to address an issue that Respondents the State of Texas (the "State") and Garry Mauro ("Mauro"), Commissioner of the General Land Office, raised in their Brief in Opposition, Petitioner The John G. and Marie Stella Kenedy Memorial Foundation (the "Foundation") respectfully submits this Reply in support of its Petition for a writ of certiorari.

ARGUMENT

I. By Ignoring the Uncertainty of Any State Law Theory of Liability and of Any State Forum by Which the Foundation May Present Its Claims to the Disputed Land, the Fifth Circuit Rendered a Decision That Is Contrary to the Jurisprudence of this Court and of Other Circuits.

Respondents blandly assert that Tex. Nat. Res. Code § 33.171 provides the Foundation with a theory and a forum by which to adjudicate title to the Disputed Land. On the contrary, nothing could be less certain.

In looking askance at the Foundation's officer suit against Mauro under 42 U.S.C. § 1983, the Fifth Circuit completely ignored why such lawsuits aimed at adjudicating rights in property were first created and why they are now so rare. Under federal law, a claimant in the Foundation's position could bring an action for just compensation or money damages under the Tucker Act, 28 U.S.C. §§ 1346, 1491. Consequently, a suit in the nature of an equitable quiet title action against a federal officer based upon the reasoning of *United States v. Lee*, 106 U.S. (16 Otto) 196, 208-09, 1 S. Ct. 240, 250-51, 27 L. Ed. 171 (1882) would not lie, because the claimant would not have been deprived of its property without due process of law. The clear and obvious waiver of sovereign immunity that the Tucker Act provides renders officer suits unnecessary. *Larson v. Domestic & Foreign Service Corp.*, 337 U.S. 682, 696-705, 697 n. 18, 69 S. Ct. 1457, 1464-69, 1465 n. 18, 93 L. Ed. 1628 (1949).

Many states have their own versions of the Tucker Act that waive sovereign immunity in like manner. Examples include New York, N.Y. Ct. Cl. Act §§ 1-30; Ohio, Ohio Rev. Code § 2743.01 to .72; and Illinois, Ill. Comp. Stat. ch. 705, §§ 505/1 to 29. When a state provides a forum and a remedy for a claimant in the Foundation's position, then a procedural due process claim against a state official under § 1983 based on the reasoning of *Tindal v. Wesley*, 167 U.S. 204, 221-23, 17 S. Ct. 770, 777-78, 42 L. Ed. 137 (1897) and of *Ex parte Young*, 209 U.S. 123, 159-60, 28 S. Ct. 441, 454, 52 L. Ed. 714 (1908) is not necessary. By waiving sovereign immunity plainly, the state has afforded the claimant due process. *Toledo, Peoria & Western R. Co. v. State of Illinois, Dept. of Transp.*, 744 F.2d 1296, 1297, 1299 (7th Cir. 1984), *cert. denied*, 470 U.S. 1051, 105 S. Ct. 1751, 84 L. Ed. 2d 815 (1985).

Texas has absolutely no analogue to the Tucker Act.

The Tucker Act (like many of its state law counterparts) waives sovereign immunity only for purposes of money damages, not equitable relief. *See United States v. Testan*, 424 U.S. 392, 397-98, 96 S. Ct. 948, 952-53, 47 L. Ed. 2d 114 (1976). If a claimant in the Foundation's position were to seek simply an adjudication of title and prospective equitable relief (rather than just compensation) against the federal government, its remedy would not be a *Lee*-style officer suit, but rather a proceeding against the United States itself under the Quiet Title Act, 28 U.S.C. § 2409a. This statute clearly waives sovereign immunity and allows for equitable relief of the sort the Foundation now seeks against Mauro.

Many states have their own versions of the Quiet Title Act that permit an adjudication of title as against the state. Examples include Arizona, Ariz. Rev. Stat. §§ 12-1101 to -1104; *see Land Dept. v. O'Toole*, 154 Ariz. 43, 46-47, 739 P.2d 1360, 1363-64 (Ariz. App. 1987); Idaho, Idaho Code § 6-401; *see Lyon v. State*, 76 Idaho 374, 376, 283 P.2d 1105, 1106 (Idaho 1955); and New Mexico, N.M. Stat. §§ 42-6-12 to -17; *see Brosseau v. New Mexico State Hwy. Dept.*, 92 N.M. 328, 330-31, 587 P.2d 1339, 1340-41 (N.M. 1978). In these jurisdictions, such unequivocal waivers of sovereign immunity would provide a claimant with due process and obviate the need for an officer suit.

Texas has absolutely no analogue to the Quiet Title Act.

All that Texas has is Tex. Nat. Res. Code § 33.171. That statute provides:

> (a) A littoral owner whose rights may be affected by any action of the [School Land B]oard may bring suit for a declaratory judgment against the State of Texas in a district court in Travis County to try the issues.
>
> (b) Service of citation may be obtained by serving the [C]ommissioner [of the General Land Office].

Chapter 33 of the Texas Natural Resources Code, of which this provision is a part, pertains only to the surface estate in state-owned submerged lands and to the management of that surface estate by the School Land Board (the "Board"). Tex. Nat. Res. Code §§ 33.001(a), 33.002. In particular, Chapter 33 authorizes the Board to lease and grant permits for the use of state-owned submerged land.

The dispute in this case, however, pertains primarily to the mineral estate in the Disputed Land. It is not at all clear that Tex. Nat. Res. Code § 33.171 permits an action for declaratory judgment with respect to the mineral estate.

Although Tex. Nat. Res. Code § 33.171 waives the State's sovereign immunity as to *something*, it is anything but certain that it provides the Foundation with a means by which to present all of its claims to the Disputed Land. Under Texas law, sovereign immunity is jurisdictional, and waivers of sovereign immunity are construed *strictissimi juris*. *E.g.*, *Mount Pleasant I.S.D. v. Estate of Lindburg*, 766 S.W.2d 208, 211 (Tex. 1989); *Duhart v. State*, 610 S.W.2d 740, 742 (Tex. 1980). Judged by this standard, there are many arguments that Tex. Nat. Res. Code § 33.171 does not waive sovereign immunity in this case. Doubts about the efficacy of this statute can only increase when one considers that no Texas appellate court has ever construed it. Indeed, to the best of the knowledge of the Foundation's attorneys, the Texas Attorney General never has relied on this statute, and no Texas trial court has ever had occasion to construe the statute, even though it was enacted in 1973.

The Foundation spent years seeking the consent of the Texas Legislature to bring a suit to adjudicate the proper littoral boundary. Neither the Foundation nor Respondents nor any member of the Legislature ever believed that this quest for legislative consent was rendered superfluous by Tex. Nat. Res. Code § 33.171. Indeed, Respondents themselves never suggested that this statute had any relevance to the Foundation's claims

until after the United States District Court for the Southern District of Texas had remanded the Foundation's state law causes of action to the state court in Kenedy County, where the Disputed Land is situated. Respondents then claimed that venue was proper in Travis County, where the seat of government is located, rather than in Kenedy County, but that sovereign immunity deprived *any* state court of jurisdiction to consider the Foundation's case. Suddenly awakening to the absurdity of this position, Respondents exhumed Tex. Nat. Res. Code § 33.171.

As Respondents note, the interpleader suits that the State's mineral lessees have filed in the Travis County state court have been consolidated, and the State has moved for summary judgment on the Foundation's cross-claim. To date, Respondents have not raised sovereign immunity in the interpleader action. There is no guarantee, however, that sovereign immunity will not be raised as a bar to adjudicating the Foundation's rights in the Disputed Land under Tex. Nat. Res. Code § 33.171. Texas rules of pleading do not require a cross-claim defendant to file an answer to the cross-claim setting forth all the factual contentions and affirmative defenses on which the cross-claim defendant proposes to reply.

Under Texas law, subject matter jurisdiction may not be established by any form of waiver or estoppel. *Abderholden v. Morizot*, 856 S.W.2d 829, 832 (Tex. App. – Austin 1993, no writ); *Gorman v. Life Ins. Co. of N. Am.*, 752 S.W.2d 710, 713 (Tex. App. – Houston [14th Dist.] 1988), *aff'd in part, rev'd in part on other grounds*, 811 S.W.2d 542 (Tex. 1991), *cert. denied*, ___ U.S. ___ 112 S. Ct. 88, 116 L. Ed. 2d 60 (1991). In particular, the Attorney General of Texas may not waive the State's sovereign immunity,

which is a bar to subject matter jurisdiction. *Department of Public Safety of Texas v. Great Southwest Warehouses, Inc.*, 352 S.W.2d 493, 494-95 (Tex. Civ. App. – Austin 1961, writ ref'd n.r.e.). Indeed, subject matter jurisdiction (including a waiver of sovereign immunity) may not even be conferred by judicial estoppel. *See Board of Educ. of City of Chicago v. Box*, 191 Ill. App. 2d 31, 35-36, 547 N.E.2d 627, 630 (1989); *Avalon Distrib., Inc. v. P.S. Operations, Inc.*, 76 Ohio App.3d 615, 616-17, 602 N.E.2d 758, 759 (1991), *jurisdictional motion overruled*, 63 Ohio St. 3d 1474, 591 N.E.2d 243 (1992).

While there is no certainty that sovereign immunity will bar an adjudication of the Foundation's claim under Tex. Nat. Res. Code § 33.171, neither is there any certainty that sovereign immunity will not close the courthouse doors against the Foundation. Nothing would prevent Respondents from raising sovereign immunity at any time, and certainly nothing would prevent the trial court – or any Texas appellate court – from raising the question of subject matter jurisdiction *sua sponte*.

The Fifth Circuit, having received post-submission briefing on the tortured procedural history of this case, knowing fully how effectively Respondents were using sovereign immunity in state courts, and having been apprised of the uncertainty of any remedy under Tex. Nat. Res. Code § 33.171, nonetheless affirmed the dismissal of the Foundation's § 1983 claim. Indeed, the Fifth Circuit did not deem the tenuous status of a state law forum or remedy to be of any particular importance.

In taking this position, the Fifth Circuit's holding was flatly contrary to the decisions of this Court and of other

Circuits. The very reason that officer suits of this nature are now so rare is that the federal government – and many states – offer a clear-cut waiver of sovereign immunity. The Tucker Act (and its state law counterparts) and the Quiet Title Act (and its state law counterparts) leave no room for question that a claimant in the Foundation's position may vindicate its rights to disputed property against the sovereign. Tex. Nat. Res. Code § 33.171 does nothing of the kind.

This Court has long held that a state may not block the doors of every courthouse, leaving a violation of federally guaranteed rights with only a doubtful remedy. *General Oil Co. v. Crain*, 209 U.S. 211, 226-27, 28 S. Ct. 475, 480, 52 L. Ed. 754 (1908). The Fifth Circuit turned its back on this reasoning. If Texas courts should ultimately hold that Tex. Nat. Res. Code § 33.171 does not afford the Foundation a theory and a forum – and this outcome is entirely possible – then there would be a right without a remedy, and despotism would hold sway in Texas. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L. Ed. 60 (1803).

When federal officers hold a citizen's property under color of the government's claim of right, and when the Tucker Act or the Quiet Title Act do not provide an obvious and unequivocal remedy, judicial review is still deemed essential, and federal courts have searched high and low for any basis for jurisdiction. *See, e.g., United States v. Woodall*, 12 F.3d 791, 793 (8th Cir. 1993) (citing *United States v. Lee, inter alia*). By the same token, when state officials hold a citizen's property under the state's claim of right, and when there is no "little Tucker Act" or

"little Quiet Title Act" in sight, an officer suit based on *Ex parte Young* and *Tindal v. Wesley* is well laid.

CONCLUSION

By ignoring the very rationale for the judicial recognition of an officer suit when rights in property are at issue, and by ignoring the very reason for the current rarity of suits such as the Foundation has brought, the Fifth Circuit rendered a decision that undercuts the jurisprudence of this Court and of other Circuits. Accordingly, a writ of certiorari should issue to review the holding of the Court of Appeals.

Respectfully submitted,

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